No. 2510

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

SWAYNE & HOYT, INC.
(a corporation),

Plaintiff in Error,

vs.

GUSTAV BARSCH,

Defendant in Error.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

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Filed this ..... day of April, 1915.

FRANK D. MONCKTON, Clerk.

By ..... *Deputy Clerk.*

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This brief is intended to cover certain points raised by the defendant in error in his brief and upon the oral argument.

The First Branch of the Case.—Swayne & Hoyt, Inc., Merely Managing Agent for the Western Steam Navigation Company, Owner of the "Camino" and Therefore Not Liable to Barsch.—Reply to Defendant In Error's Argument on This Point.

(1) THE QUESTION IS PROPERLY BEFORE THIS COURT ON THE FIRST ASSIGNMENT OF ERROR AND THE EXCEPTION TO THE TRIAL COURT'S REFUSAL TO GRANT A DIRECTED VERDICT.

The bill of exceptions contains the following statement:

"All of the evidence having been received the cause was argued to the jury by the attorneys for the respective parties and in the course of the presentation of law to the court the defendant requested the court to give the following instruction to the jury:

" 'The jury is instructed to find for the defendant.'

"But the giving of the foregoing instruction the court refused, to which refusal the defendant excepted on the ground that the instruction should be given and under the evidence in (Bill of Exceptions x7, 109) the cause the defendant was not liable, the exception being then and there allowed by the court."

The first assignment of error reads as follows:

"By the uncontradicted evidence in the cause Swayne & Hoyt, Inc., was the managing agent only of the steamship 'Camino', and the court erred in refusing to give the instructions to the jury requested by the defendant to return a verdict for the defendant."

Defendant in error contends, at pages 1-4 of his brief, that the question of the insufficiency of the evidence to sustain the judgment against Swayne & Hoyt, Inc., upon the ground that Swayne & Hoyt, Inc., was shown to be merely managing agent of the owners of the "Camino", was not raised by the foregoing exception and assignment. The ground of this contention is that the request for a directed verdict is not shown to have contained a statement of the ground upon which it was made. In other words, counsel contend that, conceding that there was no evidence in the record at the time the case went to the jury upon which the jury could have found Swayne & Hoyt, Inc. liable to Barsch,

nevertheless the district court cannot be held to have erred in declining plaintiff in error's request for a directed verdict, because plaintiff in error did not specify the precise ground in its request. We submit that this contention is not supported by the law or any rule of practice prevailing in the federal courts.

(a) In the federal courts it is the duty of the trial judge to direct a verdict for the defendant, even if no motion is made, if the evidence would compel him to set aside a verdict for the plaintiff.

Burgie v. Hicks, 203 Fed. 340, 349:

> "In the United States court it is the duty of the court to direct a verdict when the evidence is such that the court would set aside a verdict the other way, if rendered, as against the evidence."

Shoup v. Marks, 128 Fed. 32, 37:

> "The trial court may direct a verdict in any case where the evidence is of such conclusive character that the court, in the exercise of a sound judicial discretion, would be compelled to set aside a verdict returned in opposition to it."

In

Gibboney v. Board of Chosen Freeholders, 122 Fed. 46,

it appeared that the trial court had granted a directed verdict of its own motion. In upholding the trial court's ruling, Judge Acheson, speaking for the third circuit, said, at page 48:

> "The assignment that the court erroneously directed the jury to find a verdict for the defendant, we think, is without valid basis. The plaintiff did not ask leave to take a voluntary nonsuit, nor did

> the defendant move for compulsory nonsuit. The only course then left to the trial court was a direction for a verdict for the defendant."

We submit at this point that if it is the duty of a district judge, or even if it is only within the power of a district judge, to direct a verdict of his own motion in a case where he would be compelled to set aside a contrary verdict, it cannot be necessary for the party making a motion for a directed verdict to embody in such motion the ground or grounds upon which it is based.

(b) It has been held that in the federal courts a request for an instruction "that the jury return a verdict in favor of defendant" is the equivalent in all respects to a motion for a directed verdict.

Detroit Crude Oil Co. v. Grable, 94 Fed. 73, 6th Circuit, 1899,

(quoting from the syllabus):

> "A request for a charge that, under the evidence, the verdict must be for defendant, is equivalent to a motion to direct a verdict."

The court said, speaking through Judge Clark:

> "The court also denied the defendant's motion at the close of the whole evidence to direct a verdict for the defendant, to which exception was duly taken; and, although the argument in this court has been directed mainly to the court's action in that respect, yet, curiously enough, the court's refusal to grant the motion is not specifically assigned for error. The court also refused the defendant's first request, which was in this language: 'Under the evidence in this case, the verdict of the jury must

> be for the defendant'. This request must be regarded as in all respects equivalent to a motion to direct a verdict, for it could have no other purpose or meaning, and we accordingly so treat it."

Erie R. Co. v. Rooney, 186 Fed. 16, at p. 18, Judge Knappen, speaking for the Sixth Circuit, in 1911, said:

> "Plaintiff contends that the insufficiency of the evidence to support a verdict can only be raised by motion at the close of the testimony, as distinguished from a written request for an instructed verdict. There is no merit in this proposition. It is immaterial whether the request for directed verdict be made orally or in writing. The only requirement is that it be made at the close of all the testimony and before submission to the jury. The rules governing the action of the court on request for directed verdict are well understood."

The procedure followed in these two cases is precisely that which was followed in the case at bar. The plaintiff in error requested the court to instruct the jury to return a verdict for the defendant. As pointed out in these two authorities, this must be taken in all respects as the equivalent of a motion for a directed verdict.

(c) The only authority cited by defendant in error does not sustain his contention.

At page 4 of his brief, defendant in error cites *United Engineering and Contracting Co. v. Broadnax,* 136 Fed. 351, as sustaining the proposition that a motion for a directed verdict must contain a statement of the ground upon which it is based. In that case a motion to dismiss the complaint was made upon the ground "that there has been no evidence to establish the damages under the rule of law applicable to the facts in the

case''. The motion was denied, and in the higher court an attempt was made to raise an entirely different question based upon the denial of the motion. In other words, in that case the motion had been made upon a specific ground, and the court held in effect that it was thereby limited to that ground. This is made clear by the following excerpt from the opinion:

> ''It is contended that there was no sufficient proof upon which prospective profits could be estimated, 'for the reason that the value of the stone in the ledge * * * was never proved'. This point was not reserved by any exception. Defendant seeks to raise it under denial of motion to dismiss the complaint; but the ground therein stated, 'that there has been no evidence offered to establish damages under the rule of law applicable to the facts in the case', called the attention of the court only to the proposition already discussed, viz., that defendant insisted that contract price should be compared, not with cost, but with market value.''

Another point of distinction lies in the fact that in the *Broadnax* case the motion was a motion to dismiss and was not a motion for a directed verdict.

In the present case the motion was in the form of a request that the court direct the jury to find for the defendant. It was in effect a demurrer to the evidence, and it challenged the sufficiency of the evidence to support a verdict in favor of the plaintiff. The evidence showed beyond dispute that Swayne & Hoyt, Inc., were managing agents for the owners of the ''Camino''. If, as a matter of law, Swayne & Hoyt, Inc., could not be held liable to Barsch under the evidence, the trial judge would have been compelled to set aside any verdict

that could have been rendered against the defendant in favor of Barsch, and under the authorities it was the duty of the trial judge to grant the instruction.

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(2) THE BILL OF EXCEPTIONS IS SUFFICIENT.

A still more technical objection is raised by defendant in error at page 5 of his brief.

The bill of exceptions contains the evidence and the trial court's instructions and the requests for instructions. Some of the evidence is given in narrative form, other portions of it in condensed form. The trial court's certificate reads as follows:

> "And it is now certified by the undersigned United States District Judge for the District of Oregon, sitting at the trial of this action, that the foregoing bill of exceptions contains substantially all of the evidence offered and received at the trial, with the exception of the evidence as to the extent, nature, and character of the plaintiff's injuries and the damages sustained by him and upon these questions the evidence was conflicting."

It is claimed that this court is precluded from examining the sufficiency of the evidence to support the judgment, because it appears from this certificate that all of the evidence has not been brought up.

(a) The amount of damages to plaintiff not being in dispute, it was unnecessary to bring up the evidence bearing upon that point.

The certificate of the trial judge in effect says that substantially all of the evidence except that relating to

the amount of damages to the plaintiff is contained in the bill. To have included such evidence in the bill would have been useless. The jury found that the plaintiff was damaged in the sum of $1400. The sufficiency of the evidence to support that finding is not attacked upon this writ of error. The only question raised upon this writ involving the sufficiency of the evidence to support the judgment is as to whether or not plaintiff in error, Swayne & Hoyt, Inc., can be held liable for those damages. It was, therefore, proper practice to bring up only such evidence as could have a bearing upon that subject. To have done otherwise would have been to ignore the repeated admonitions of the Supreme Court on this matter of practice.

In

Hickman v. Jones, 9 Wallace, 197, 19 L. Ed. 551,

Mr. Justice Swayne condemned the practice of bringing up all the evidence in the following language:

> "We have to complain in this case, as we do frequently, of the manner in which the bill of exceptions has been prepared. It contains all the evidence adduced on both sides, and the entire charge of the court. This is a direct violation of the rule of this court upon the subject. We have looked into the evidence and the charge only so far as was necessary to enable us fully to comprehend the points presented for our consideration—thus in effect reducing the bill to the dimensions which the rule prescribes. No good result can follow in any case from exceeding this standard. Our labors are unnecessarily increased, and the case intended to be presented is not unfrequently obscured and confused by the excess."

(b) The certificate shows that substantially all the evidence involving the point presented to this court is in the bill.

The certificate says that substantially all the evidence except the evidence as to the amount of damages to plaintiff is included in the record. The certificate could not truly have said that all of the evidence was in the record for two reasons. In the first place, the record did not contain the evidence as to the amount of plaintiff's damages, and we have shown that such evidence was properly omitted from the bill. In the second place, it will be seen that while some of the testimony in the record was in the form of question and answer, other portions of the testimony was condensed—a practice uniformly approved and commended. This being the case, it is clear that all of the evidence having any substantial bearing upon the question which this court is called upon to decide is contained in the bill. That is all that the court wants in the bill.

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(3) THE PAYROLL. BARSCH SIGNED IT BEFORE AND AFTER THE ACCIDENT. HIS SIGNATURE TO IT ATTESTS THAT HE WAS EMPLOYED BY THE OWNERS OF THE "CAMINO" AND NOT BY SWAYNE & HOYT, INC.

It was stated by counsel, upon the argument, that Barsch did not sign the pay roll until long after the injury. This statement is also made at page 8 of defendant in error's brief, counsel there saying:

> "The evidence that plaintiff signed a pay roll *long after the injury* and employment, which indicated that he was being employed by the owners of

> the boat (trans. p. 25), amounts to nothing. The common working man signs such documents without paying the least attention to their provisions."

The signature of the pay roll by Barsch is of such great significance upon this appeal that we feel under the obligation of presenting all of the evidence upon that subject to the court herewith.

The testimony shows that the method which was pursued in paying off the stevedores was to have the pay roll made up at the dock and then forwarded to Kennedy's office. The stevedores were at liberty to call upon the following day and receive their pay upon signing the pay roll. As a matter of actual practice, it appears that they usually authorized the business agent of the Union to call, sign for them, and receive their money; consequently, a great number of pay rolls were shown signed by the names of the men, with "E. A. S." after each name, signifying that E. A. Schneider, the business agent of the Longshoremen's Union, had called and collected the men's pay. Schneider himself testified to this practice.

> "Q. You have signed this thing a great many different places, for different men?
>
> A. Yes, sir; the boys tell me they are laible to be busy, going on the dock the next day, and they tell me 'Ed, go and get my money.'
>
> Q. This 'E. A. S.' is everywhere your name?
>
> A. Yes, sir.
>
> Q. So you are very familiar with the pay roll?
>
> A. Yes, sir; I put my signature for every man's name I sign, so the office force or cashier knows." (Trans. p. 49.)

Schneider was shown to have signed for the witness Henry Wolff (Trans. p. 67). He was also shown to

have signed for the witness Ferguson (Trans. p. 74). Indeed, it is clear from the record that this form of pay roll had been in effect for a long time, and was thoroughly familiar to all of the stevedores engaged on Albers No. 3 Dock.

The statement that Barsch did not sign the pay roll until after the accident is, however, specifically refuted by the record. It is true that Barsch testified that he signed the pay roll for the particular voyage three weeks after the injury, and that he did not receive his pay for that particular voyage until ten weeks after the injury; also that he signed that particular pay roll, which was the pay roll for Voyage No. 12, under protest (Trans. pp. 100, 101). Another pay roll, however, was shown him, being the pay roll for Voyage No. 4, and he admitted that it was his own signature which appeared on that pay roll, and that he had signed his name thereon and received his pay. We quote at length testimony as to these two pay rolls:

> "Q. So I will show you now, Mr. Barsch, a pay roll for Voyage No. 4, Camino.
>
> Mr. GILTNER. I object to that as not in evidence here.
>
> Mr. GUTHRIE. We are going to use it in a minute. Wait a minute.
>
> The COURT. Let him see it.
>
> Q. On which I show you, on the second page, signature, 'G. Barsch'. I will ask if that is your signature?
>
> A. Yes, that is my signature.
>
> Q. And this purports to show you drew pay?
>
> A. Yes.
>
> Q. And you signed this in Mr. Kennedy's office?
>
> A. Yes, in Mr. Kennedy's office.

Q. You would be able to know what that was when you were looking it over?

A. I don't look at anything. The clerk put this in front of me, and I signed it.

Q. No reason why couldn't read it if you wanted to, was there?

A. We was not asked to read that.

Q. That is true; but you do not sign your name on being asked, to anything?

A. They only said to me to sign this pay roll. 'You got so much money, sign this.' They put it in front of you, you sign your name, and they take it away.

Q. Do you make a practice of not reading what you sign?

A. The pay roll, as long as I see my money is correct.

Q. You don't care where you get it from. Whether it says the steamer Camino, or the steamer Navajo, you don't care?

A. If I am not working for them, it would be different.

Q. Then you didn't read this. Is that what I understand?

A. Yes, as much as—when we go in this office, Mr. Kennedy or his clerk says, 'This is the pay roll for the steamer Camino' or any other steamer, sign it.

Q. So you know you are signing for the pay roll of a steamer?

A. Yes, been working there.

Q. And the fact is, you were working for that steamer?

A. I was working there on the dock, helping the unloading that steamer Camino.

Q. The clerk, says, 'Here is a pay roll for the steamer?'

A. Yes.

Q. You sign your name, that is all. Is that right?

A. Yes, that is all.

Q. So you knew, from what the clerk told you, you were working for the steamer?

A. No, didn't say we were working for steamer. Was unloading for Swayne & Hoyt, as much as I understand.

Q. Did the clerk tell you you were working for Swayne & Hoyt?

A. It is their steamer.

Q. I don't think you are qualified to say, is their steamer.

Mr. GILTNER. The steamer didn't pay you.

Mr. GUTHRIE. I think the best evidence would be the pay roll.

The COURT. I suppose it is the same as in every office. They pass out the pay roll and say sign it, and they never look.

Mr. GUTHRIE. I offer this in evidence, No. 4. Marked 'Defendant's Exhibit B'.

Q. This is your signature on Exhibit A. This is your signature about the middle of the page on this one?

A. Is that the same one?

Q. No, this is another. This is No. 12.

A. Yes.

Q. Is this your signature, is all I want to know?

A. The signature is right, but the pay is not right.

Q. Well, I don't care about that. The only thing is whether this is your signature.

A. I didn't take the pay at all from that steamer.

Mr. GILTNER. What is that?

A. I didn't take the pay from that steamer until ten weeks after on that pay roll.

Mr. GILTNER. When did you sign that?

A. I signed under protest. It was put to me to sign that pay roll so they could forward to San Francisco. I signed it about three weeks afterwards, after it was made out; three weeks after the steamer left, I signed it under protest. I says, 'I don't know why I signed here for and how it is coming out.' I says, 'I am hurt and I don't know

how it will come out, whether I sign this or whether I got a right to sign this or not.' So I don't sign it, but the clerk told me, he says, 'This pay roll has got to go to San Francisco; got to go to Swayne & Hoyt in San Francisco, and we can't send it off'; and he says, 'You are the only one not signed.' So under that protest I signed it, but didn't take the money.

By Mr. GILTNER. Did you take the money?

A. No, I didn't.

Q. So when you protested then, you didn't even read it over to see what it was about?

A. The clerk told me it was the pay roll." (Trans. pp. 97-101.)

As to the contention that Barsch did not have a proper understanding of what he was signing, it is submitted that no foundation is laid in the record for the claim that Barsch should not be bound by his signature. No showing is made that anything was said or done which prevented Barsch from reading the paper. Under such circumstances, a person signing a receipt is bound by its contents.

We have set forth the contents of this receipt in our opening brief. We set it forth again at this point because we believe it absolutely establishes the fact that Barsch himself knew that he was being employed, not by Swayne & Hoyt, Inc., but by the owners of the "Camino". The form of the pay roll is described at pages 38 and 39 of the record as follows:

"The pay roll referred to was offered and received in evidence as the pay roll, containing the following at the head of the pay roll:

'Office of Swayne & Hoyt, San Francisco, California.

Received from Captain ..... for account of above steamer and her owners.'

Then followed signatures of men engaged in the unloading and the name of the plaintiff Barsch was signed to the pay roll, each of the names signed on the pay roll indicating that each had received a given amount for work while unloading the vessel. On the pay roll were stamped the words 'Steamer Camino, Voyage No. 12'."

The evidence as to the pay roll may be summed up as follows:

(1) *The pay roll was on a form that had been in constant use for a long time. It had been signed by the members of Barsch's gang and their representative repeatedly.*

(2) *Barsch is shown to have personally signed it in receipting for pay on a previous voyage of the "Camino", Voyage No. 4.*

(3) *Barsch is shown to have signed it in receipting for his pay on Voyage No. 12 of the "Camino", the voyage during which he was injured. The fact that he signed three weeks after his injury, does not diminish the value of the pay roll as evidence of Barsch's knowledge that he was employed by the owners of the "Camino". The intention of parties to a contract may be gathered from their subsequent, as well as their prior or contemporaneous conduct. In fact the signature of Barsch to this receipt after the injury and the subsequent acceptance of pay thereafter, under it, amounts to a binding admission by Barsch that he was employed by the owners of the "Camino", and not by Swayne & Hoyt, Inc.*

(4) *There is absolutely no evidence in the record upon which the claim can be predicated that Barsch should be relieved from the effect of his receipt to the pay roll. He was given free opportunity to read the pay roll before he signed it. He was able to read and understand, and there was nothing ambiguous about the language of the receipt. There is not the slightest evidence that any advantage was taken of him in obtaining his signature, and if he did not read before signing, the fault is his own, and he cannot avoid the effect of his signature.*

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(4) SWAYNE & HOYT, INC., WAS NOT AN UNDISCLOSED AGENT. EVERYONE IS SHOWN BY THE RECORD TO HAVE KNOWN THAT IT WAS THE "AGENT FOR THE OWNER". THE FACT THAT THE "CAMINO" WAS OWNED BY THE WESTERN STEAM NAVIGATION COMPANY WAS A MATTER OF PUBLIC RECORD.

Counsel have failed to distinguish the authorities cited in our opening brief to the effect that where an agent discloses that he is acting as an "agent for the owners of a vessel" such agent has made a sufficient disclosure to avoid the rule that an undisclosed agent is liable to persons dealing with him in the alleged belief that he is acting as a principal.

It only becomes necessary, therefore, to establish that, as a matter of fact, Swayne & Hoyt, Inc., made it known to Barsch that it was acting as the "agent for the owner" of the "Camino". It is submitted that this cannot be controverted. It is shown that Barsch actually signed a receipt which showed on its face that he

was in the employment of the owners of the "Camino". Kennedy testified that he believed himself to be merely a sub-agent for the owners, acting through Swayne & Hoyt, Inc.

Under the general rule stated in the authorities, this would be sufficient to determine plaintiff in error's position. It is to be noted further, however, that the fact that the Western Steam Navigation Company was the owner of the "Camino" was a matter of public record. No harm could come to Barsch, therefore, providing he knew that plaintiff in error was "agent for the owner" of the "Camino". Being possessed of such knowledge, he could have no difficulty in determining the exact identity of his employer. Counsel's intimation that Barsch was in a difficult position after he was injured, in determining whom he should sue, is thus answered. Barsch knew that Swayne & Hoyt, Inc., was acting as the agent for the owner of the "Camino". He also knew that he was being paid by the owners of the "Camino". He was chargeable with knowledge as a matter of law that the ownership of the "Camino" was a matter of public record, and he could have ascertained by inquiry at the Custom House that the Western Steam Navigation Company was such owner.

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(5) THE ONLY AUTHORITY RELIED UPON BY COUNSEL IS NOT IN POINT.

Counsel refer to the case of

Tippecanoe Loan and Trust Co. v. Jester, 101 N. E. 915.

In that case it was held that the managing agent of a building could be held liable to a person injured through the negligent operation of an elevator in the building simply by reason of the fact that he was shown to have control of the elevator.

The case is clearly distinguishable from the case at bar. This is made clear by the following extract from the opinion:

> "The real ground, as we see it, for the application, or non-application, of the rule, as to liability, is not one of agency, but a question of the duty imposed by general principles of law, upon the owner, or those in control of property for him, to so use or manage the property as not to injure the property of another, by its negligent use, or to injure the person of another who is where he has a right to be, or is in the use of property for which use he pays. That there is a privity in law, by virtue of which every one in charge of property is under obligation to so use it as not to injure another. It is a duty imposed by law, it is true, but privity arises from the obligation to those in a situation to insist upon its respect, and the neglect of performance must, in order to render the agent liable, be neglect of performance of a duty which he owes third persons, independent of and apart from the agency which arises from contract."

Thus, in the case cited, the ground of liability was that the agent, by assuming actual control of a dangerous instrumentality, became liable to the public generally for any negligent operation of such instrumentality. In the present case, Barsch sued Swayne & Hoyt, Inc., upon the theory that the latter corporation was his employer and that, as such employer, it was under the obligation of furnishing him a safe place to work upon

the dock. Barsch further contended that, as his employer, Swayne & Hoyt, Inc., was under the obligation imposed by the Oregon Employer's Liability Act of 1911. The action is not, therefore, based upon a duty which Swayne & Hoyt, Inc., might have owed to the public generally, assuming that it had been shown to have been in control of the winch, but upon the duty which Swayne & Hoyt, Inc., was supposed to owe to Barsch as his employer.

There is, furthermore, no possible support in the record for the contention that Swayne & Hoyt, Inc., was in control of the winch. Even if it could be said that there was sufficient evidence to support such a finding, it could not be said that anything was done or left undone by Swayne & Hoyt, Inc., which could support a finding of negligence as between persons under no special duty toward one another. In other words, if no relationship of master and servant were shown, the Oregon Employer's Liability Act could not possibly apply, and the operator of the winch would not be under a statutory or other obligation to furnish a system of signals nor would the operator of the winch be under an obligation to Barsch, or to any one else, to make the place surrounding the winch a safe one.

For these reasons, the doctrine of the Tippecanoe case is clearly inapplicable.

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(6) THE CLAIM THAT SWAYNE & HOYT, INC., ADMITTED LIABILITY IS GROUNDLESS.

It is argued by counsel with some show of earnestness that the negotiations which are stated by Barsch

to have taken place in San Francisco between himself and Mr. Moran of Swayne & Hoyt, Inc., show an admission of liability upon the part of the latter company. Barsch's testimony upon this point is set forth at pages 78 to 82, inclusive, of the record. In substance, what appears to have taken place was, that Barsch called upon Mr. Moran and the latter referred him to Mr. Campbell, the attorney for the company. Nothing ever came of the proposed compromise.

Under ordinary circumstances it is hard to conceive how the mere discussion of a proposed compromise can be taken to be an admission of a liability. Counsel have not pointed out any particular portion of the record which is relied upon to furnish such an alleged admission. We invite the attention of the court to the portion of the record above referred to (Trans. pp. 78-82).

In the case at bar there is nothing to show that the negotiations of Swayne & Hoyt, Inc., with Barsch, even if they can be deemed in the light of an admission, were upon any different basis than those which had previously taken place; in other words, Swayne & Hoyt, Inc., acted throughout the entire transaction as the agent for the owners, namely, the Western Steam Navigation Company.

The character and effect of the negotiations under discussion are clearly pointed out by the trial judge in the following portion of his instructions (Trans. p. 162):

> "Again there has been some testimony about an interview between Mr. Barsch and Mr. Moran, and

Swain & Hoyt in San Francisco, and an examination that was made of him by a physician, at the request or direction of Swain & Hoyt, and that Mr. Kennedy, the local man here in Portland, whom plaintiff claims to be the agent of Swain & Hoyt, reported this accident to Swain & Hoyt. Now, that may be consistent with liability on the part of Swain & Hoyt, but not inconsistent with non-liability, because if they were the managing agents representing the owners, the natural person to whom any one having a claim against the owners of the vessel would go would be to the managing agent, and that is Swain & Hoyt; the natural person to whom Kennedy would make his report would be the managing agent, the man who represented the vessel, and so that fact alone would not justify a recovery in this case'' (Trans. pp. 162, 163).

The Second Branch of the Case—The Trial Court Erred in Applying the Employers' Liability Act of Oregon of 1911.—Reply to Defendant in Error's Argument Upon This Point.

(1) THE QUESTION IS PROPERLY BEFORE THIS COURT ON THE FOURTH ASSIGNMENT OF ERROR AND THE DEFENDANT'S EXCEPTION TO THE TRIAL COURT'S REFUSAL TO INSTRUCT THAT THE OREGON ACT DID NOT APPLY.

Defendant in error raises the technical objection to the consideration of this question by this court upon the ground that plaintiff did not except to the portions of the charge of the court which in effect told the jury that the Employers' Liability Act of Oregon governed the case.

Plaintiff in error did not except to such portions of the charge, it is true, but its reason for not doing so

was that it had already requested the court affirmatively to charge the jury *that the Act did not apply,* and to the refusal of the court to give this requested instruction plaintiff in error excepted (Trans. p. 157). The bill of exceptions recites that "the ground of the exception being that the Employers' Liability Law of the State of Oregon had no application to the loading or unloading of vessels coming in and out of the City of Portland and engaged in interstate commerce * * *". We think there can be no doubt that the question is before the court upon the record.

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(2) THERE IS UNCONTRADICTED EVIDENCE IN THE RECORD THAT THE "CAMINO" WAS ENGAGED IN INTERSTATE COMMERCE.

We accept counsel's challenge contained at page 40 of defendant in error's brief, with respect to the assertion that the "Camino" was engaged in interstate commerce.

The fact that the steamers on the Arrow Line were engaged in interstate commerce was and is so thoroughly well known that we did not anticipate the question would be raised. For that reason in our opening brief we stated it to be conceded. In at least two portions of the record testimony was elicited by counsel for the defendant in error himself that the "Camino" was engaged in interstate commerce. We quote those portions of the record:

> "Q. By Mr. GILTNER. There is one question may I ask before he goes by, so as to give them a chance to cross-examine. Did Swayne & Hoyt have any cargo or freight on that boat, the steamer Camino, on the 31st day of March, 1913?

"A. *There was cargo aboard that ship under their directions, that they had secured at San Francisco, and sent up here that the ship was handling.*" (Testimony of C. D. Kennedy, Trans. p. 26.)

* * * * * *

"Q. Do you know if there was any cargo being taken out of the hold of the vessel at that time that was shipped as Swayne & Hoyt's goods?

"A. Not as Swayne & Hoyt's goods. Once in awhile you would find a case would be marked 'Care of Arrow Line', or 'Shipped via Arrow Line'.

"Q. That would be some goods that were transshipped would it; having been started by another route, and then carried subsequently by the Arrow Line?

"A. *Either that way or routed in San Francisco. For instance, if I would ship goods to you from San Francisco, to Portland, I would mark the goods 'Care Arrow Line'.*" (Testimony of A. R. Williams, Trans. pp. 117, 118.)

It is unnecessary to argue that a vessel which is shown to carry freight from the port of San Francisco to the port of Portland is engaged in interstate commerce.

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(3) BARSCH COULD NOT HAVE RECOVERED WITHOUT SHOWING THAT AT THE TIME HE WAS INJURED THE PLAINTIFF IN ERROR OWED HIM A DUTY ARISING OUT OF HIS EMPLOYMENT. THE CONTRACT OF EMPLOYMENT, IF THERE WAS ANY, WAS A MARITIME CONTRACT. CONSEQUENTLY THE MARITIME LAW SHOULD HAVE BEEN APPLIED NOTWITHSTANDING THAT THE TORT TOOK PLACE ON LAND.

Counsel for the defendant in error concede that Barsch's contract of employment, if there was one, was

a maritime contract. We in turn concede that the injury took place on land, and that the tort was what was commonly known as a non-maritime tort.

We earnestly submit that the fact that the tort involved in this case took place upon land is not determinative of the question as to whether or not the maritime law should be applied. To so hold is to prefer the form to the substance—to apply the rule without the reason.

Had Barsch been a mere stranger, licensee or trespasser upon the dock at the time of the injury, he could not have recovered. There would have been no negligence. There would have been no violation of any duty which Swayne & Hoyt, Inc., or which any one, owed to him. Consequently, when Barsch came to prove his case, it became necessary for him to show that a greater duty was owed to him by Swayne & Hoyt than Swayne & Hoyt would have owed him had he merely been a licensee or trespasser. It thereupon became necessary for Barsch to introduce his contract of employment.

The contract of employment was introduced, or at least that which is claimed to have been evidence of such a contract, was introduced. Barsch's recovery was upon certain duties arising out of that alleged contract. Without the existence of such a contract Swayne & Hoyt, Inc., would not, under the Oregon statute, have been under the duty to Barsch to see that a safe system of communication was established between the men in charge of the winch and Barsch and his fellow employees. Without the existence of such a con-

tract Swayne & Hoyt, Inc., would not have owed Barsch the duty of furnishing him a safe place to work. Without the establishment of such a contract Barsch would have been thrown out of court without the judgment which he now holds, or any judgment.

It seems to be reduced to an absolute certainty that without the existence of this alleged maritime contract this judgment which Barsch has obtained could never have come into existence; and we submit that whatever name may be given to the injury to Barsch or to the tort which occurred upon the dock in Portland, the substantial rights which Barsch has sought to enforce, and has enforced in this action, arise out of, and are dependent for their very existence upon a maritime contract. This being so, it violates the spirit of the rule that makes the maritime law the exclusive basis of maritime rights to apply a state statute in this case.

This reasoning has found recognition in the courts. In the case of

Schuede v. Zenith S. S. Co., 216 Fed. 566,

discussed *in extenso* in our opening brief, Judge Killits said:

> "As we look at it, the provisions of the law maritime as to the relation of a seaman to his employment are part of the substance and obligations thereof, which cannot be modified by state law, even through recourse to the saving clause of the Code. * * *
>
> "In the case of a cause of action for an injury incurred in the course of a maritime employment, to avoid the manifest inconveniences and inequalities involved in plaintiff's interpretation of the saving clause in question, it is not only reasonable,

> but well within the language of the law, to require whichever court, state or federal, is entered to work out a remedy, to enforce the general and uniform law maritime under which the contract of employment was made."

Again, it was said by Judge Ward, speaking for the judges of the second circuit, in

> *Cornell Steamboat Co. v. Fallon,* 179 Fed. 293,
>
> "The contract between the defendant and the deceased is a maritime contract, and establishes their relation as well in courts of law as in courts of admiralty."

Certain it is that if the maritime law is to be applied to the exclusion of state legislation at all, it should be applied in those cases generally where it can be shown that the right sought to be enforced is wholly non-existent except for a contract conceded to be of a maritime character.

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(4) THERE CAN BE NO DOUBT BUT THAT THE OREGON ACT OF 1911, AND PARTICULARLY THAT FEATURE OF IT WHICH THE TRIAL COURT APPLIED IN THE PRESENT CASE, CONSTITUTES AN INTERFERENCE WITH INTERSTATE COMMERCE WITHIN THE PROHIBITION OF THE COVINGTON CASE.

Counsel's argument upon this branch of the case is in effect that the provisions of the Oregon Employers' Liability Act of 1911 are severable; that conceding that some of those provisions imposing safety appliance regulations would amount to an undue interference with interstate commerce, nevertheless the sole

provision which the court applied in the present case did not constitute such interference.

The particular provision of the Liability Act which the trial court applied in instructing the jury in the present case was as follows:

> "* * * all machinery other than that operated by hand power shall, whenever necessary for the safety of persons employed in or about the same or for the safety of the general public, be provided with a system of communication by means of signals, so that at all times there may be prompt and efficient communication between the employees or other persons and the operator of the motive power."

This provision, when applied to vessels engaged in interstate commerce, imposes the following burdens upon owners of vessels engaged in interstate commerce: (1) It requires the installment of signal apparatus wherever machinery other than that operated by hand-power is found upon the vessel; (2) notwithstanding that there may be other protective measures equally efficient to accomplish the safety of the employees and the general public with respect to such machinery, the owners are required to install signal apparatus; (3) owners are subjected to fine and imprisonment if this provision of the statute be not observed.

Counsel contend that this statute does not impose a burden upon interstate commerce, because no particular kind of signals are required. In other words, it is argued that the statute will not lead to difficulty, because the owner of the vessel is only required to have a system of signals, and not any specified system, and

that, therefore, the difficulty will not be met of having Oregon require one particular system and an adjoining state a different one.

The fallacy of this argument is apparent. The statute imposes a direct obligation upon the owners of installing "a system of communication by means of signals, so that at all times there may be prompt and efficient communication between the employees or other persons and the operator of the motive power". Signals there must be, and the sufficiency and character of such signals are left to be determined or passed upon by a judge or jury of the particular state enacting the statute. Thus, the owner is not in any sense helped by this apparent looseness in determining the precise character of signals. In the Covington case it was held that the State of Kentucky could not fix the number of passengers to be carried on a street car engaged in interstate commerce. It was pointed out that such an ordinance might and probably would bring the street car company into conflict with regulations adopted by an Ohio municipality into which the car line extended.

The proposed regulation in the present case is subject to the same criticism. The regulation requires, first, protection of machinery by means of signals; secondly, it in effect requires that the sufficiency of such signals shall be determined by an Oregon judge or an Oregon jury. This regulation may, upon the same reasoning employed by Justice Day in the Covington case, bring the owners of vessels engaged in interstate commerce into conflict with the ideas embodied in similar legislation in another state, where protection by means of

some other system than that of signals may be preferred, or where the ideas of judges or juries as to the sufficiency of such system of signals may conflict with those which may be adopted by judges or juries in the State of Oregon.

Let us suppose, for instance, that under judicial interpretation by the courts of Oregon, it becomes settled that this provision of the Act is not complied with by the installation of a certain type of signals. Provided that the principle is established that state action may extend to this sort of regulation, there is nothing to prevent the State of California, or any other state, from compelling the owners to install the very system condemned by Oregon.

Let it be further remembered that the field of action in which the state interference with commerce is sought to be upheld in this case is upon a higher plane than that involved in the Covington case. Uniformity is necessary in many matters affecting interstate commerce on land, but the necessity for uniformity in matters of maritime commerce has found expression in the world-wide adoption of a common system of jurisprudence—the maritime law.

It is respectfully submitted that the judgment should be reversed.

Dated, San Francisco,
April 3, 1915.

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